In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 776

MOSES H. CONE MEMORIAL HOSPITAL, ET AL.,
PETITIONERS

v.

G. C. SIMKINS, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. The Negro respondents in this case—who are physicians, dentists, and persons in need of medical or dental treatment—filed this action in the United States District Court for the Middle District of North Carolina to secure the desegregation of the Moses H. Cone Memorial Hospital and the Wesley Long Community Hospital in Greensboro, North Carolina. The complaint, in addition to requesting an order requiring non-discriminatory admissions to, and staff privileges at, the hospitals, also asked for a judgment declaring unconstitutional so much of the Hill-Burton Act (42 U.S.C. 291) as directs the Surgeon General (pursuant to an exception to

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a broad non-discrimination clause) to authorize the construction of hospital facilities and the promotion of hospital services on a separate-but-equal basis (42 U.S.C. 291e(f)).[1] Since the proceeding was one in which "the constitutionality of * * * [an] Act of Congress affecting the public interest * * * [was] drawn in question," the United States intervened.[2] The government agreed with respondents that the separate-but-equal proviso in section 291e(f) should be declared unconstitutional and that an injunction should issue to restrain petitioners from discriminating on account of race or color.

The district court dismissed the complaint on the ground that petitioners were not subject to the prohibitions of the Fourteenth Amendment.[3] The Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed (two judges dissenting), holding that the equal protection clause applied to petitioners; that this clause precluded petitioners from discriminating in their patient and staff admission policies on account of race or color; and that the separate-but-equal portion of the Hill-Burton Act was unconstitutional.

2. The Hill-Burton Act provides federal funds for the construction of governmentally-owned and voluntary nonprofit hospitals. The purpose of the statute is to assist the States to "afford the necessary physi-

[1] The Surgeon General issued the regulation contemplated in the statute (42 C.F.R. 53.112) and the complaint requested that this regulation, too, be declared unconstitutional.

[2] 28 U.S.C. 2403; Rule 24(a), F.R. Civ. P.

[3] The district court did not reach the question of the validity of the separate-but-equal proviso in the Act.

cal facilities for furnishing adequate hospital, clinic, and similar services to all their people" (42 U.S.C. 291(d)). Funds are allocated in accordance with a State-wide plan adopted by each participating State and administered by a State agency (42 U.S.C. 291b). The Act requires the States to set up detailed standards for maintenance and operation of participating hospitals, and these hospitals are under close and continuing supervision by the State. A total of $1,269,950 has been appropriated by the federal government to the Cone Hospital and $1,948,800 to the Long Hospital.

3. The government argued below—and the court of appeals agreed—that the Hill-Burton program necessitated such State "involvement"[4] in petitioner's activities that a correlative State responsibility, within the meaning of the Fourteenth Amendment, had to be imposed. In our view, this conclusion was correct.

a. Petitioners argue that they are being held to the equal-protection-clause standard solely because they were the beneficiaries of federal funds. Actually, the governmental involvement was much more pervasive. Any State participating in the Hill-Burton program assumes, as a State function, the obligation of planning for adequate hospital care for "all the people" of the State. The State may carry out its plan either through governmentally-owned or through private nonprofit hospitals; but when the plan is implemented in any particular area by the construction of voluntary nonprofit hospitals, Hill-Burton funds are unavailable *pro tanto* for the con-

[4] See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722.

struction of governmentally-owned hospitals. Thus, when a State admits a non-governmental institution into the plan, the latter performs one of the State's acknowledged functions. There is warrant for concluding that such an institution becomes, to that extent, a State instrumentality with concomitant obligations. Cf. *Marsh* v. *Alabama*, 326 U.S. 501; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461.

b. It seems clear, at a minimum, that the admission policies of participating hospitals are made a matter of governmental concern. Congress has regulated, and has authorized the Surgeon General to regulate, the admission practices of participating hospitals in the national interest. It has further provided that the several States regulate those policies and exact binding assurances as to the nature of those policies. The Surgeon General is required to participate in and direct the implementation of the congressional policy that Hill-Burton hospitals be available for the use of all the people, without discrimination. The final performance of the continuing obligation, imposed by the federal government and the State, falls on the hospital which renders the services. At least to the extent of their admission policies, therefore, the Act contemplates that the hospitals are to act as and for the State. What a hospial does with respect to race, creed, or color must therefore conform to the Fourteenth Amendment. Compare *McCabe* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 235 U.S. 151, 162; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 535 (C.A. 5).

c. There are elements of State involvement other than those arising out of the Hill-Burton program. These are significant even though they would not be independently dispositive. Both hospitals operate under licenses granted by the State; both are exempt from *ad valorem* taxes; six of the fifteen trustees of Cone Hospital are appointed by the State or by public agencies; and the Cone Hospital trains nurses on behalf of State educational institutions. Both of the institutions in question have a decidedly public character. As a memorandum submitted to the district court by the General Counsel of the Department of Health, Education, and Welfare shows, they differ little from governmental hospitals except in the manner of selection of the governing boards and the lack of availability of tax funds to meet deficits. For that reason, there will be no drastic change under the court of appeals' decision in the character and the activities of the institutions involved except in the area of race relations.

4. The discrimination challenged in this case stems directly from the interrelated federal-State program in which each of the entities has played an indispensable part. Actually, it was the underlying federal statute which led to the North Carolina program of hospital construction of which the Cone and Long hospitals were substantial beneficiaries. If the discrimination is constitutionally impermissible, the statute which authorized both federal and State governments to sanction and participate in such discrimination is, to that extent, invalid. *McCabe* v. *Atchison, Topeka and Santa Fe Ry. Co., supra; Bolling* v.

Sharpe, 347 U.S. 497; *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105, 114; *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, 203; *Ming* v. *Horgan*, 3 R.R.L.R. 693, 699 (Cal. Super. Ct. 1958); *Baldwin* v. *Morgan*, 287 F. 2d 750, 754 (C.A. 5). Had the court of appeals decided this case against petitioners without passing upon the validity of the Hill-Burton proviso it would, in effect, have required petitioners to cease engaging in activities which are validated by federal law.

5. In the view of the United States, the court of appeals was correct in both aspects of its decision. We believe that the deep governmental involvement in the activities of petitioners called for application of the criteria of the Fifth and Fourteenth Amendments. If that is so, the court of appeals could not properly avoid the responsibility of declaring the Hill-Burton proviso unconstitutional. We do not urge, however, that the questions presented are unimportant or insubstantial. If, therefore, the Court entertains any serious doubts as to the correctness of the decision below, review would be appropriate.

Respectfully submitted.

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